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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-2046

THE FIVE SMITHS, INC., *Petitioner*,

v.

WILLIAM H. HOLLAWAY, et al., *Respondents*.

No.....

THE FIVE SMITHS, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI
To the Temporary Emergency Court of Appeals
Of the United States

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PETITION FOR A WRIT OF CERTIORARI
To the Temporary Emergency Court of Appeals of the United States

The petitioner, The Five Smiths, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals of the United States entered in these proceedings on June 20, 1974.

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals is not yet reported and appears at pp. A-1-39 of the Appendix. No opinion on the merits was rendered by the United States District Court for the Northern District of Georgia.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on June 20, 1974. The

jurisdiction of this Court is invoked under Section 211(g) of Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743 (Dec. 22, 1971).

QUESTIONS PRESENTED

1. Could the Temporary Court, having conceded that the President promulgated the Executive Order imposing a 90-day wage and price freeze in violation of the APA's rulemaking procedures, nevertheless refuse to set aside the Order as required by section 706(2)(D) of the APA?

2. Did the Temporary Court abdicate its responsibility as an Article III Court to make an independent judicial interpretation of the Executive Order, rather than merely rubber-stamping the OEP's position under the "great deference" rule?

3. Was the retroactive application of the August 15, 1971 Executive Order to require the Falcons to refund price increases "charged, assessed and received" for tickets sold prior to that date authorized by a proper construction of the Executive Order, and, if so, does such construction violate the constitutional prohibition against *ex post facto* laws, and deprive the Falcons of vested property rights without due process of law?[1]

[1] Petitioner submits that these constitutional issues are of substantial public importance. However, consideration of such issue would be pertermitted if this Court granted review and on the merits either concurred with petitioner that the Executive Order was invalid or agreed that the Temporary Court inappropriately applied the "great deference" rule. Accordingly, petitioner has not briefed the third question presented.

STATUTORY PROVISIONS AND EXECUTIVE ORDER INVOLVED

1. The Administrative Procedure Act, 5 U.S.C. §§551, 553, 706 (1970).[2]

2. Executive Order No. 11615, 36 Fed. Reg. 15727 (August 15, 1971).[3]

STATEMENT OF THE CASE

These consolidated cases involve the validity under the Administrative Procedure Act of Executive Order No. 11615 which was issued by the President on August 15, 1971 and imposed a 90-day period of wage and price controls known as Phase I. Also involved is the standard of judicial review of informal guides or administrative interpretations of the Executive Order by the Office of Emergency Preparedness which were accepted and ordered enforced by the lower court out of "great deference" without affording petitioner the kind of independent judicial review which Article III and due process of law demand.

The petitioner (hereinafter referred to as the "Atlanta Falcons") is the owner of the National Football League team known as the Atlanta Falcons. In 1970, petitioner made the decision to increase the prices of tickets to the Falcons' home games to be played during the 1971 season. These price increases were publicly announced in January 1971, and order forms reflecting the increased prices were mailed to

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[2] Appendix pp. A-40-43.

[3] Appendix pp. A-44-48.

season ticket holders in February 1971. During February and March 1971, the Falcons received 41,000 orders for season tickets at the increased prices, each of which was accompanied by a $10.00 deposit. In April of 1971, the Falcons mailed invoices to the season ticket purchasers for the balances due on their ticket orders, and by the end of June 1971, the Falcons had received full payment for 41,590 season tickets (71.4% of the capacity of Atlanta Stadium). On August 2, 1971, the Falcons mailed more than 328,000 fully-paid individual game tickets, all of which were delivered to the purchasers prior to August 15, 1971.

Prior to August 15, 1971, the Falcons made numerous financial commitments in reliance upon the additional revenues produced by the 1971 price increases, including contracting to pay veteran players $117,300 more in salaries for 1971 over 1970, acquiring new players, the contracting for and conducting of the training camp at Furman University, and renting of the Atlanta Stadium, all preparatory to the playing of football games during the 1971 season.

On August 15, 1971, the President issued Executive Order No. 11615, imposing economic controls for a 90-day period commencing August 15, 1971 and ending on November 13, 1971. The Executive Order provided in pertinent part:

> Section 1. (a) Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like

or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

It was stipulated by the respondents that the President did not, prior to the issuance of the Executive Order, give notice of an intention to issue such order, that the President did not give interested persons an opportunity to submit written data, views or arguments, and that, alternatively, the President did not make any finding that notice and public procedure thereon impracticable, unnecessary or contrary to the public interest, or incorporate such a finding and the reasons therefor in the record as a part of the Executive Order. *Stipulation* ¶17, Appendix p. A-49.

Shortly after September 7, 1971, the Director of the Office of Emergency Preparedness [OEP], to whom power to administer the Executive Order had been delegated, issued an interpretative ruling to the National Football League Players Association, the union representing NFL players, stating that players who were in training camps prior to August 15, 1971 were entitled to receive salary increases prescribed by

their respective contracts, even though such players had not participated in any NFL football games prior to the commencement of Phase I on August 15, 1971.

During Phase I, the OEP sporadically issued what were known as "Circulars" containing various OEP interpretations of the Executive Order. These Circulars expressly stated that they were issued "for general information only . . . [as] general guides compiled from OEP Economic Stabilization Circulars and do not constitute legal rulings." OEP Cir. No. 101, 36 Fed. Reg. 18739 (Sep. 21, 1971).

These Circulars provide a tentative and often shifting interpretation of the Executive Order. A good example is control of school tuitions. Complete exemption was provided in OEP Reg. No. 1, 36 Fed. Reg. 16515 (Aug. 21, 1971), but revoked three days later by an amendment. 36 Fed. Reg. 16585 (Aug. 24, 1971). Then during the following month the OEP provided that tuition could be increased if there were substantial transactions during the base period, confirmed by deposits. OEP Cir. No. 101, §403(9), 36 Fed. Reg. 18739 (Sep. 21, 1971). One month later, the OEP provided that *any* deposit during the base period was sufficient to make the tuition a complete transaction. OEP Cir. No. 102, §403(5), 36 Fed. Reg. 20482 (Oct. 20, 1971).

On September 11, 1971, the OEP issued Circular No. 11 which contained the OEP's only statement with reference to the application of the Executive Order to sales of tickets to sporting events played during Phase I. Circular No. 11 provided in pertinent part:

> The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze.

Stipulation ¶25(b), (c), Appendix p. A-49. This administrative interpretation of the Executive Order was held by the lower court to be binding on the federal courts under the so-called "great deference rule" as applied by the Temporary Emergency Court of Appeals in a series of Economic Stabilization Act cases beginning with the decision in *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (Temp. Emer. Ct. App. 1972), *cert. denied*, 410 U.S. 928 (1973).

The Atlanta Falcons played five home games during Phase I. The team had sold, delivered and had been fully paid for 217,151 tickets to these games at increased prices prior to the issuance of the Executive Order on August 15, 1971. The Falcons sold an additional 45,601 tickets to these five games at increased prices during Phase I.

On September 23, 1971, the Falcons instituted a declaratory judgment action in the United States District Court for the Northern District of Georgia seeking a judicial determination of the application of the Executive Order to its sales of tickets at increased prices prior to and during Phase I. *The Five Smiths, Inc. v. Hollaway, et al.* On September 25, 1971, the Government filed an action for an injunction against the Falcons. *United States v. The Five Smiths, Inc.* Jurisdiction in the cases arose under 28 U.S.C. §1331 (1970), §205 of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (Aug. 15, 1970), and

related jurisdictional statutes. On February 6, 1974, the district court certified as substantial the constitutional issues raised by the Falcons to the Temporary Emergency Court of Appeals as required by §211(c) of the Economic Stabilization Act Amendments of 1971. The Court of Appeals consolidated the cases and ordered that all issues be presented to the Court of Appeals for disposition pursuant to a stipulation of facts.

On June 20, 1974, the Court of Appeals rendered an opinion and judgment in which it rejected the Falcons' challenges to the Economic Stabilization Act, the Executive Order and the implementing regulations, and remanded the case to the district court with directions that the court frame an appropriate remedy for the restitution of the price increases to the five Falcons games played during Phase I. In reaching this conclusion, the Court of Appeals ruled that:

(a) Although the President was assumed to be an "agency" as defined in Section 551(1) of the Administrative Procedure Act, and was engaged in rulemaking within the meaning of section 553 of the APA when he issued Executive Order No. 11615, the Executive Order would not be set aside even though it had been stipulated by the Government that the President did not give notice of such rulemaking or alternatively make any findings that such notice was "impractical, unnecessary or contrary to the public interest" or reflect such findings and the reasons therefor on the record as a part of the Executive Order, despite the mandatory requirements of section 553 of the APA to the contrary. Appendix pp. A-22-25.

(b) The federal courts were obligated to accord

"great deference" to the interpretation of the Executive Order by the OEP contained in Circular 11, and were, therefore, precluded from exercising independent judicial review (or as the Court put it "de novo" review) of this interpretation as applied to the Falcons' sales of season tickets. Appendix pp. A-14-15.

The effects of these rulings were to convert Phase I from a "freeze" to a "roll back" of the Falcons' ticket prices, contrary to the stated intentions of the President, and to impose a retroactive *price* freeze upon completed sales of football tickets to the Falcons' games without a corresponding *wage* freeze upon the salaries of the Falcons' players who were to perform in the same games.

Because these rulings of the Temporary Emergency Court of Appeals present issues of great public importance which are in direct conflict with controlling provisions of the Administrative Procedure Act, precedent in other Courts of Appeal, and decisions of this Court defining the relationship between the Article III courts and administrative agencies, the petitioner seeks review of these rulings by this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

I. Because the President Is Subject to the Administrative Procedure Act in Exercising the Rulemaking Powers Delegated by Congress in the Economic Stabilization Act, the Temporary Court Was Required by Section 706(2)(D) to Set Aside Executive Order 11615

upon Finding it Was Issued in Violation of Section 553.

Whatever claims the President may have to inherent executive authority, he is clearly subject to statutory restriction in the exercise of delegated legislative powers. It is equally clear that the Administrative Procedure Act was intended to prescribe procedures for administrative actions of the Executive Branch, including the President. In promulgating Executive Order 11615, the President was engaged in "rulemaking" as defined by the APA. Section 553 requires that such rules may only become effective after 30 days notice and an opportunity for interested persons to submit written data, views, or arguments. The Government admits that the President did not follow this procedure. Section 553(b)(B) provides an exception to the rulemaking procedural requirements

> when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The Government admits that the President made no such finding, and consequently no finding or statement of reasons therefor was incorporated in the regulation.

The petitioner contends that the Temporary Emergency Court of Appeals made a serious error on an important question of federal law in holding that the President's violation of section 553 of the APA did not affect the validity of the Executive Order.

The result of this holding is that no sanction at all is imposed on the President's violation of the law. The Temporary Court's after-the-fact conclusion that the President would have been justified in making the finding required by section 553(b)(B) is no substitute for the actual compliance required by the APA for exception to the usual procedures. Presumably aware that the Executive Order here in question was promulgated by a defective procedure, the President later sought Congressional ratification of regulations issued pursuant to the Economic Stabilization Act. Congress refused to approve such a measure, and further refused to amend the Act so as to make section 553 of the APA inapplicable to regulations promulgated thereunder. What Congress declined to authorize, the Temporary Court has in this case approved —the exercise of rulemaking authority by the President in defiance of the restrictions placed on that authority by Congress in the APA.

The petitioner further contends that the decision of the Temporary Court is in conflict with other Court of Appeals and District Court decisions holding that the procedural requirements in section 553 of the APA must be strictly enforced. Other courts have steadfastly demanded full compliance with the APA, but the Temporary Court has shown a willingness to tolerate what it terms "technical" violations. The decision of the Temporary Court itself thus violates section 706(2)(D) of the APA, which requires a reviewing court to set aside agency action taken without observance of procedure required by law.

A. The President violated the Administrative Procedure Act in promulgating Executive Order 11615.

The President promulgated Executive Order 11615 pursuant to a delegation of legislative power in section 202 of the Economic Stabilization Act, Pub. L. No. 91-379, 84 Stat. 796 (Aug. 15, 1970). Therefore the President's exercise of this power could be restricted by any procedural or substantive restrictions Congress wished to enact. Such restrictions would raise no separation-of-powers questions, since the President's rulemaking was not an exercise of purely executive authority, but of a delegated legislative power. Certainly the President had no "inherent" authority to freeze wages and prices. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Not only *could* the President be subjected to procedural restrictions, but it is clear that Congress *did* intend the APA to apply administrative actions by the President. The APA defines "agencies" to include comprehensively "each authority of the Government of the United States" and expressly excludes "Congress" and "the courts," but not the President. 5 U.S.C. §551(1) (1970). It thus seems clear that the APA was intended to apply to the third branch, including the President. *See Amalgamated Meat Cutters v. Connally*, 337 F.Supp. 737, 761 (D.D.C. 1971), and authorities cited therein. While the Temporary Court in the instant case declined to decide this question, it was willing to assume *arguendo* "that the President is an agency within the meaning of the APA." Appendix p. A-22.

Executive Order 11615 was a "rule" as defined by section 551(4) of the APA:

> an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy . . . and includes the approval or prescription for the future of rates, wages . . . prices . . . .

Before such substantive rules can be made effective, section 553 requires the agency to follow the APA's "notice-and-comment" rulemaking procedure. This procedure involves 30 days advance notice of the substance of the proposed rule and an opportunity for interested persons to submit comments. The Government has stipulated that the President did not follow the procedures of section 553 in promulgating Executive Order 11615. *Stipulation* ¶17, Appendix p. A-49.

Section 553(b)(B) provides a limited exception to the usual rulemaking procedures when prompt action without prior notice is required in the public interest. This exception is subject to specific conditions imposed by Congress: the agency must find for good cause that notice and public procedure would be "impracticable, unnecessary, or contrary to the public interest," and must incorporate in the rule itself this finding and a statement of reasons in support of it. The Government has stipulated that the President made no such finding in the instant case, and consequently Executive Order 11615 contains no express finding or statement of reasons as to the inadvisability of rulemaking proceedings. *Stipulation* ¶17, Appendix p. A-49. Thus the President's failure to follow the APA's notice-and-comment rulemaking procedure was not excused under section 553(b)(B).

It is clear that the President violated section 553

of the APA in promulgating Executive Order 11615. The only question at issue, then, is whether this provision of the APA should be enforced. The Temporary Court itself framed this question as "whether we must set aside the Order for failure to conform with the procedural requirements of 5 U.S.C. §553." Appendix p. A-23. Of the violation of the APA's procedural requirements, there can be no dispute.

B. The Temporary Court could not ignore the mandate of the Administrative Procedure Act that Executive Order 11615 be set aside because the President failed to observe the procedure required by law.

Congress intended that regulations, such as this one, should be invalidated by the courts if not adopted by the proper procedure. The Temporary Court asserted that it could not "agree that Congress intended to visit such consequence [setting aside the order] upon a technical violation of §553(b) . . . ." Appendix p. A-25. This conclusion is plainly contrary to the judicial review provisions of the APA, which require a reviewing court to

> (2) hold unlawful and set aside agency action, findings and conclusions found to be . . .
>
> . . . .
>
> (D) without observance of procedure required by law.

5 U.S.C. §706 (1970). Thus the Temporary Court itself violated the APA in refusing to invalidate a regulation promulgated without observance of the procedure required by section 553.

It is true that Congress has the power to exempt certain kinds of administrative action from the APA's procedural requirements, but nothing could be clearer than the intent of Congress that such requirements should apply to rulemaking under the Economic Stabilization Act.[4] The Act was amended in December 1971 to provide a partial exemption from the APA, but Congress provided specifically that sections 552, 553, and 555(e) would continue to govern actions taken under the Act. Pub. L. No. 92-210, §207(a), 85 Stat. 743, (Dec. 22, 1971). Moreover, Congress rejected an administration bill which would have ratified all regulations theretofore promulgated under the Economic Stabilization Act. *See* S. Rep. No. 507, 92d Cong., 1st Sess., U.S. Code Cong. & Ad. News 2283, 2295-97 (1971).

Other than its unsupported speculation as to congressional intent, it is difficult to discover reasons for the Temporary Court's holding that failure to comply with the APA does not invalidate the Executive Order. The Temporary Court judicially noticed various reasons for not giving advance warning of a wage and price freeze, and then justified upholding the regulation "where the reasons for exempting the President's action from the notice requirement are so obvious and compelling." Appendix p. A-25. This approach simply emasculates section 553(b)(B) of the APA, since the President admittedly failed to make the findings spe-

[4] This factor sharply distinguishes the two cases cited by the Temporary Court, Duquesne Light Co. v. EPA, 481 F.2d 1, 8 (3d Cir. 1973), and Appalachian Power Co. v. EPA, 477 F.2d 295, 502-03 (4th Cir. 1973), which held that Congress intended to create an exception to the APA's rulemaking procedure in the Clean Air Act.

cifically required by Congress in that section. This ruling is an unprecedented departure from prior cases which have held that the procedural requirements of section 553 should be strictly enforced and rules promulgated in violation thereof invalidated. The holding of the Temporary Court conflicts with decisions of the Third and Sixth Circuits, as well as several lower federal courts. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973); *Texaco, Inc. v. FPC*, 412 F.2d 740 (3rd Cir. 1969); *Kelly v. United States Department of the Interior*, 339 F. Supp. 1095 (E.D. Cal. 1972).

In *Buckeye Power, Inc. v. EPA*, the court invalidated the agency's approval of state air pollution plans for failure to follow the rulemaking procedures of section 553. 481 F.2d at 170-71. In *Texaco, Inc. v. FPC*, the court held that the failure of the FPC to follow the rulemaking procedures of section 553 rendered the regulation invalid and without force of law. 412 F.2d at 744. In *Kelly v. United States Department of Interior*, the court held an administrative regulation invalid for failure to follow the notice-and-comment procedures required by section 553. The regulation was found not to fall within the exception of section 553(b)(B) because of a deficient statement of reasons for the agency's finding that notice and public procedure were inadvisable. The *Kelly* court forcefully rejected the Government's argument that the failure to comply with section 553 should be disregarded as merely a technical violation:

> Upholding regulations which we think were defectively issued, furthermore, emasculates the Administrative Procedure Act. As the Court of

> Appeals for the Ninth Circuit has said, 'If notice of a proposed rule is not published in the Federal Register at least thirty days prior to its issuance, or if good cause is not found and *published* for the immediate issuance of a rule, the rule cannot be legally issued. (Emphasis ours.) Hotch v. United States, supra, 212 F.2d at 284. We therefore find the amended regulations to have been illegally issued.
>
> . . . In our opinion, therefore, the 30-day comment period should be closely guarded and the 'good cause' exception sparingly used. See Texaco, Inc. v. Federal Power Commission, 412 F.2d 740 3rd Cir. 1969).

339 F.Supp. at 1102. Other cases have also invalidated rules promulgated in violation of section 553 procedures. *See A. E. Staley Mfg. Co. v. United States*, 310 F.Supp. 485, 488 (D. Minn. 1970); *Pharmaceutical Manufacturers Association v. Finch*, 307 F.Supp. 858, 862-63, 868 (D. Del. 1970); *National Motor Freight Traffic Association v. United States*, 268 F.Supp. 90, 95-97 (D.D.C. 1967), *aff'd* 393 U.S. 18 (1968).

C. The holding of the Temporary Emergency Court of Appeals sets a dangerous precedent in tolerating violation of the Administrative Procedure Act.

The holding of the Temporary Court is a startling departure from the general principle that the procedural requirements of the APA must be followed in order that administrative actions be valid. Section 553 requires either notice-and-comment opportunity or a finding that such procedure would be inadvisable, and the Government has admitted that the President com-

plied with neither alternative. The Temporary Court's conclusion that the President *could have* found that advance notice was contrary to the public interest does not alter the fact that he *did not* make such a finding.

Although the APA was not designed to prevent administrative action of an emergency nature, its requirements for such an exception are explicit. As the Attorney General noted in commenting on the Committee Print of the bill which became the APA:

> This subsection is not intended to hamper the agencies in cases in which there is good cause for putting a rule into effect immediately, or at some time earlier than 30 days. The section requires, however, that where an earlier effective date is desired *the agency should make a finding of good cause therefor and publish its finding along with the rule.* [Emphasis added.]

U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* 128 (1946). Since the Government has admitted that no such finding was either made or published, the regulation cannot fall within the exception of section 553(b)(B).

Other regulations pertaining to the wage and price freeze have attempted to comply with the exception provisions. OEP Regulation No. 1 was later amended to include a statement that public proceedings were impracticable and contrary to the public interest. Pay Board regulations of November 14, 1971 were adopted without notice-and-comment procedures but included a finding of impracticability. In sustaining the regulations, a district court observed: "The Pay Board find-

ing obviates the necessity of providing an administrative hearing before the regulation may become effective." *United States v. Great Atlantic & Pacific Tea Co.*, 342 F.Supp. 272, 277 (D. Md. 1972). With regard to the Executive Order, of course, there was no such finding. Thus it is clear that the Executive Order should be held to have violated the APA.

It is clear that Congress intended administrative action in violation of the APA's procedures to be held invalid, and section 706(2)(D) so provides. Such a provision is the only possible sanction for failure to comply with the procedural requirements of section 553. If the existence of good cause to dispense with rulemaking proceedings could be determined by a reviewing court after the fact, then an agency would not need to risk committing itself in advance to a particular rationale for acting unilaterally. For the requirement of an on-the-record finding of good cause in section 553(b)(B) to have any effect at all, then it must be enforced. The decision of the Temporary Court sets a dangerous precedent in refusing to enforce the procedural requirements of the APA. These requirements must be enforced in the instant case if the APA is to continue to have its intended effect in prescribing administrative procedure.

II

The Temporary Court Abdicated its Responsibility as an Article III Court to Afford Independent Judicial Review of Administrative Interpretations of Law and Ignored Decisions of this Court Defining that Responsibility by "Rubber Stamping" Under the Rubric of the "Great Deference" Rule Informal Guidelines and

Interpretations Issued by the OEP Without any Stated Reasons or Evidence of Developed Expertise by the OEP in Making Such Interpretations.

The decision below is only one of a series of cases in which the Temporary Emergency Court of Appeals has ruled that the federal courts are obligated to give "great deference" to even the most informal guidelines and interpretations issued by the OEP and has granted such interpretations judicial enforcement without making an independent reasoned judicial evaluation of the correctness of the administrator's position. The Temporary Court's expansive interpretation of the "great deference" test was first enunciated by that Court in *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (Temp. Emer. Ct. App. 1972), *cert. denied*, 410 U.S. 928 (1973), and has been subsequently applied by that Court in a series of wage-price control cases. See Appendix pp. A-5-6. As the court below acknowledged, the "great deference" rule has been "fundamental to the development of the law of this Court," that broad "reliance has come to be placed upon . . . the opinion, analysis and application of the 'great deference test' in the context of economic controls administration." Appendix p. A-5.

The lower court's interpretation of the so-called "great deference" rule constitutes an unprecedented expansion of the decisions of this Court in *Power Reactor Development Co. v. International Union of Electrical Radio & Machine Workers*, 367 U.S. 396, 408 (1961), and *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). Such expansion flies in the face of this Court's explanation in *Zuber v. Allen*, 396 U.S. 168, 192-94 (1969), that the rule giving "great weight" to contem-

poraneous administrative construction "is only one input in the interpretational equation" and that "[t]he Court may not . . . abdicate its ultimate responsibility to construe the language employed by Congress." The Falcons submit that precisely such an abdication of the judicial function to review rather than rubber-stamp administrative decisions has occurred in this case. The ruling below constitutes a fundamental alteration in the relationship between the federal courts and administrative agencies heretofore defined by this Court in a long series of cases. Unless the proper standard of review is re-established by this Court, the ill-conceived and constitutionally-infirm "great deference" theory adopted by the TECA will be applied by the lower federal courts.

Article III of the Constitution demands that when the judicial process is invoked to enforce executive or administrative determinations, it is the duty and responsibility of the federal courts to make an independent, reasoned, judicial determination whether enforcement is warranted, and to deny enforcement when the courts determine that it is not. The opinion of Mr. Justice Brandeis in the *St. Joseph Stockyards Co. v. United States* is a classic statement of the role of the federal courts in the administrative process:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied [by an administrative agency] . . . .

298 U.S. 38, 84 (1936).

The constitutional right of judicial review is no less applicable in the area of price controls than in any other area of administrative action. Thus, in decisions

upholding the constitutionality of the Emergency Price Control Act of 1942, *Yakus v. United States*, 321 U.S. 414 (1944), and *Bowles v. Willingham*, 321 U.S. 503 (1944), this Court went to great lengths to explain that, although the Congress had altered the procedure for obtaining judicial review, these alterations were not a denial of due process so long as "*the opportunity given for the ultimate judicial determination of the liability is adequate.*" [Emphasis added.] 321 U.S. at 520. *See also Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944); *Fast v. DiSalle*, 193 F.2d 181, 184 (Emer. Ct. App. 1951).[5]

In *Davies Warehouse Co. v. Bowles, supra*, this Court independently reviewed and set aside an administrative interpretation by the OPA of the Emergency Price Control Act of 1942 and rejected the contention that the Court should defer to the OPA's contemporaneous administrative construction of the Act. In that case, the Price Administrator had ruled that public warehouses were not "public utilities" whose rates were exempted from price controls under the Emergency Price Control Act and the General Maximum Price Regulation issued pursuant thereto by the Ad-

[5] *Cf.* Amalgamated Meat Cutters v. Connally, 337 F.Supp. 737, 747 (D.D.C. 1971), in which the three-judge court placed particular reliance upon the availability of judicial review as salvaging the constitutionality of the Economic Stabilization Act by confining to constitutionally permissible bounds the broad authority delegated by Congress to the President. The Falcons also raised the delegation argument in the proceedings below, and the court, relying on *Meat Cutters*, upheld the constitutionality of the Act. Yet, the Temporary Court eviscerated the very safeguard of judicial review upon which *Meat Cutters* relied by adopting the aberrant "great deference" standard which the Falcons now ask this Court to review.

ministrator. In a lengthy opinion, the Emergency Court of Appeals sustained the ruling of the Price Administrator, citing in support of its conclusion, the ordinary meaning of the term "public utilities" as not including warehouses, the need for nationwide uniformity in the administration of price regulations (it was the Davies' contention that the courts should follow the state law in California which regulated warehousemen's prices as "public utilities"), the existence of a wartime emergency, and the fact that the Price Administrator had himself made a contemporaneous construction of the Act immediately after its passage as excluding utilities, but not warehouses. *Davies Warehouse Co. v. Brown*, 137 F.2d 201 (Emer. Ct. App. 1943). Of particular significance to this case was the ruling of the Emergency Court in which it said:

> Finally, we cannot overlook the fact that by Amendment No. 1 to Supplemental Regulation No. 11, the Price Administrator granted complete exemption to nine classes of common carriers and other public utilities without any regard to their status as to existing rate regulation [but which did not exempt warehouses.] This contemporaneous administrative construction of the scope of the exemption appears to have met with the approval of the Congress, for in Section 1 of the amendatory act of October 2, 1942 . . . .

137 F.2d at 206. In reversing the Emergency Court of Appeals, the Supreme Court specifically addressed itself to the contention that it should defer to the Administrator's contemporaneous construction of the Act as reflected by his regulations. Mr. Justice Jackson said:

> Lastly, it is contended that we should accept

> the Administrator's view in deference to administrative construction. The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense in this case. It has hardly seasoned or broadened into a settled administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so. We do not think it should overweigh the considerations we have set forth as to the proper construction of the statute.

321 U.S. at 156.

This Court has repeatedly held in other cases that "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . ." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965), and that the validity of any administrative action is a question for the independent determination by the federal courts. *See, e.g., NLRB v. Brown*, 380 U.S. 278, 290-91 (1965). The *American Ship Building* case and *NLRB v. Brown* involved adjudicative determinations of the NLRB made after lengthy evidentiary hearings before the agency (something which was not available here), which had condemned employers' conduct as unfair labor practices. In each case, the Courts of Appeals had made independent determinations of the issues, and had denied enforcement of the orders. Before this Court, it was the Government's contention that the lower courts should not have made an independent de-

termination of the issues, but should have deferred to the expert judgment of the NLRB. Although the NLRB has proven itself to be far more competent and successful in administering the labor laws of the United States than were either the OEP and the Cost of Living Council in administering the Economy, this Court emphatically refused to defer to the agency's rulings and made an independent determination that the administrative rulings were invalid. In *NLRB v. Brown* the Court said:

> It is argued, finally, that the Board's decision is within the area of its expert judgment and that, in setting it aside, the Court of Appeals exceeded the authorized scope of judicial review.... Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' American Ship Building Co. v. National Labor Relations Board, 380 U.S., at 318, 85 S.Ct., at 967.

> Courts must, of course, set aside Board decisions which rest on an 'erroneous legal foundation.' National Labor Relations Board v. Babcock Wilcox Co., supra, at 112-113, 76 S.Ct. 679. . . .

380 U.S. at 290-95.

The decision below is at odds with the standard of judicial review established by this Court and reflected by its decision in the *Davis Warehouse* case, *NLRB v. Brown*, and by a long series of other cases involving regulatory schemes of equal or greater complexity than that established by the Executive Order. *See Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960) (FPC); *Social Security Board v. Nierotko*, 327 U.S. 358, 368-69 (1946); *SEC v. Chenery Corp.*, 317 U.S. 80 (1943); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953). The teaching of these cases is that the federal courts are not obligated to sit by passively out of deference to agency interpretations, but are obligated to make an independent determination as to whether the administrative position is right or wrong.

A further illustration of the extent to which the ruling of the Temporary Court is out of step with prior rulings of this Court defining the relationship of the courts to the administrative process is the fact that the Temporary Court has enforced an administrative guideline which consisted of a single conclusory sentence in Circular 11 despite the fact that it was unaccompanied by either findings or a statement of reasons to explain or justify the OEP's conclusion.

The Temporary Court lost sight of the fact that such informal "guides" as those represented by Circu-

lar 11 issued by administrative agencies are not entitled to the same weight as substantive legislative rules or adjudicatory determinations which are published after extensive investigations, hearings and studies by the agencies. This Court has repeatedly held that such "guides" are no more than statements of someone's opinion as to the meaning of a controlling statute (or as in this case an Executive Order having the force of statute) and are not entitled to any special weight beyond the "thoroughness evident in its consideration, validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade . . ." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Haggar Co. v. Helvering*, 308 U.S. 389, 398 (1940).

This Court has repeatedly held since the *Chenery* case that, even in areas of agency discretion, a statement of the grounds for agency action is an essential prerequisite to judicial review and enforcement — without a statement of grounds, judicial enforcement of agency action must be denied. As this Court emphasized:

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make must judge the propriety of such action solely on the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . .

SEC v. Chenery Corp., 332 U.S. 194, 196 (1943). This Court has also held that the grounds for agency action

must be stated by the agency itself *on the record.* "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *accord, FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). As the Temporary Court acknowledged in the *Southern California* case, Circular 11 stands alone without any statement of grounds for the extraordinary ruling of the OEP. *See* 472 F.2d at 1072 & n.12.

In summary, it is apparent that the Temporary Court was awed by what it believed to be the enormity of the task and the expertise of the OEP in administering the program of economic controls, and mutely accepted the OEP's unexplained interpretation of the Executive Order without requiring even the most basic statement of grounds for the agency's position which were an essential prerequisite to meaningful judicial review. In uncritically accepting the OEP's interpretation, the Temporary Court disregarded the Court's warning that, although

> [e]xpert discretion is the lifeblood of the administrative process, . . . 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion'.

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962).

Since the OEP's interpretation of the Executive Order is unsupported by any record statement of the findings or reasons on which it was based, certiorari should be granted and enforcement of this interpreta-

tion against the Falcons should be denied. *SEC v. Chenery Corp., supra; FTC v. Sperry & Hutchinson Co., supra.* Alternatively, the case should be summarily remanded to the lower court with directions that Circular 11 be disregarded, and that it make its "own independent determination of the correct application of the governing principles," *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960), to the Falcons' ticket sales, under proper standards of judicial review, uninfluenced by the exaggerated "great deference" rule which was misapplied by the Temporary Court in this and other cases.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Temporary Emergency Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Martin E. Kilpatrick, counsel for The Five Smiths, Inc., do hereby certify that I have on this date served each of the opposing parties with three copies of the within and foregoing Petition of The Five Smiths, Inc. by depositing the same in the United States mails in envelopes containing adequate postage, properly addressed to their counsel of record as follows:

The United States of America by serving:

Solicitor General of the United States
United States Department of Justice
Washington, D. C. 20530

and

Mr. Paul T. Michael, Attorney
United States Department of Justice
Room 3334
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Washington, D. C. 20530

Burt DeRieux by serving:

Mr. James A. Eichelberger
Suite 1515, Peachtree Center South
225 Peachtree Street, N. E.
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This 19th day of July, 1974.

Martin E. Kilpatrick
Attorney for
The Five Smiths, Inc.

APPENDIX

Opinion of the Temporary Emergency Court of Appeals A-1

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APPENDIX

OPINION OF THE TEMPORARY EMERGENCY COURT OF APPEALS

(June 20, 1974)

TEMPORARY EMERGENCY COURT
OF APPEALS
OF THE UNITED STATES

No. 5-6

BURT DeRIEUX, et al.,
Plaintiff-Appellee,

v.

THE FIVE SMITHS, INC.,
Defendant-Appellant.

No. 5-7

THE FIVE SMITHS, INC.,
Plaintiff-Appellant,

v.

WILLIAM H. HOLLAWAY, et al.,
Defendants-Appellees.

No. 5-8

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE FIVE SMITHS, INC.,
Defendant-Appellant.

Before TAMM, Chief Judge, VAN OOSTERHOUT and HASTINGS, Judges. HASTINGS, Judge.

These consolidated cases are before us pursuant to §211(c) of the Economic Stabilization Act of 1970, as amended[1] (the amended Act), upon certification by the district court of substantial constitutional issues. We granted the joint motion of the parties to have the entire cases in Nos. 5-7 and 5-8 presented to us for consideration, and subsequently ordered that No. 5-6 be consolidated therewith. Since it now appears that all facts necessary for a complete adjudication of this controversy have been stipulated,[2] we shall exercise our discretion under §211(c) to decide the cases in their entirety at this time.[3]

At the heart of all three cases is a single question: did the Atlanta Falcons professional football team violate the Economic Stabilization Act by playing football games during the "Phase I" price freeze at prices which exceeded those charged for games played during 1970? Phase I was initiated by Executive Order 11615, 36 Fed. Reg. 15727 (1971), and was effective during the 90-day period from August 15 through November 13, 1971.

The Five Smiths, Inc. (the Falcons) operate the Atlanta Falcons as a member of the National Football

[1] 12 U.S.C.A. §1904 n. (Supp. 1974).

[2] The parties have jointly filed a stipulation of facts, with exhibits, to which plaintiff in No. 5-6 has filed a "caveat" reserving the right to present evidence on particular issues.

[3] See *United States* v. *Ohio*, T.E.C.A., 487 F.2d 936, 938 (1973), *cert. granted*, 42 U.S.L.W. 3457 (Feb. 19, 1974); *National Petroleum Refiners Association* v. *Dunlop*, T.E.C.A., 486 F.2d 1388, 1391-1392 (1973).

League (NFL). In No. 5-6, the Falcons are defendant in a class action brought by Burt DeRieux, an Atlanta lawyer, on behalf of all season ticket holders for the 1971 Falcon football season. DeRieux originally sought reimbursement of illegal overcharges. By amendment to the complaint he now additionally seeks treble damages, attorneys fees and costs under §210(b) of the amended Act.

No. 5-7 is an action by the Falcons against the Office of Emergency Preparedness (OEP), its Director and Regional Director, the Cost of Living Council (CLC), the Executive Director and individual members of the CLC, and the Commissioner of Internal Revenue. The complaint seeks declaratory and injunctive relief against the application and enforcement of the Phase I freeze with respect to Falcons 1971 football ticket prices.

Finally, No. 5-8 was brought by the United States pursuant to §205 of the original Economic Stabilization Act of 1970[1] (the 1970 Act), to enjoin ticket price violations and to require the Falcons to refund amounts already illegally received.

The docket numbers of the cases reflect the order in which they were filed during September, 1971, all in the Northern District of Georgia. Proceedings in all three cases eventually were stayed, by agreement of the parties, pending the outcome of similar litigation involving University of Southern California season football tickets. See *University of Southern California* v. *Cost of Living Council*, T.E.C.A., 472 F.2d 1065

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[1] Pub. L. 91-379, 84 Stat. 796 (Aug. 15, 1970).

(1972). A petition for certiorari in *University of Southern California* was denied by the Supreme Court on February 20, 1973. 410 U.S. 928. Thereafter, the Government filed motions for summary judgment in Nos. 5-7 and 5-8. Without reaching the merits of the motions, the district court on February 6, 1974 certified the constitutional issues in all three cases to this court.

In 1970, the Falcons' management decided to raise ticket prices for home games during the 1971 football season. The price increases were announced in January, 1971, and amounted to $1.50 and $2.50 per game, depending upon seat location. Prices were not raised for a few "ground" and "field level" seats; however, such seats represented a small percentage of the 58,000-seat capacity of Atlanta Stadium. Sales of season tickets at the new prices were commenced on February 1, 1971, at which time the Falcons mailed order forms for 1971 season tickets to past season ticket holders. By the end of June, 41,590 season tickets had been sold and fully paid for. These tickets were mailed to purchasers on August 2, 1971, and all were delivered prior to August 15, the date the freeze went into effect.

The Falcons played five home games during the freeze, the first of which was a pre-season "exhibition" game. Unlike many NFL teams, the Falcons did not play any exhibition games at home prior to August 15. Of the total number of individual game tickets eventually sold for the five games played during the freeze, 217,151 were sold prior to August 15 (mostly in the form of season tickets) and 45,601 were sold thereafter. The amount of revenue from these five

games which is attributable to the challenged price increases is $407,912.00. It is this sum (trebled in No. 5-6)[5] which is the subject of the present litigation.

The Falcons' argument before this court may fairly be described as a frontal assault upon two decisions which have become fixtures in the scheme of economic stabilization law. *Amalgamated Meat Cutters & Butcher Workmen* v. *Connally*, D.D.C., 337 F. Supp. 737 (1971) (*Meat Cutters*), decided by a three-judge district court prior to the establishment of the Temporary Emergency Court of Appeals, upheld the constitutionality of the Economic Stabilization Act as it existed in August, 1971, when Phase I was initiated. Even more fundamental to the development of the law of this court has been *University of Southern California* v. *Cost of Living Council*, *supra* (*USC*). The rather narrow issue decided in that case — whether the Phase I freeze applied to tickets sold prior to the freeze for sporting events occurring during the freeze — apparently has not been laid to rest. See *Manning* v. *University of Notre Dame Du Lac*, T.E.C.A., 484 F.2d 501 (1973); *Oakland Raiders* v. *Office of Emergency Preparedness*, N.D. Calif. (No. C-71-2213, Jan. 2, 1974), *appeal docketed*, T.E.C.A. No. 9-11 (March 21, 1974); and *cf. Murphy* v. *O'Brien*, T.E.C.A., 485 F.2d 671 (1973). Broader reliance has come to be placed upon a more general aspect of *USC*, namely, the opinion's analysis and application of the "great deference test" in the context of economic controls administration. *USC*, *supra*, pp. 1068-1069. See *United States* v. *IBEW*

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[5] Possibly because DeRieux purports to represent season ticket holders only, the recovery sought in 5-6 is somewhat less than three times the $407,912.00 figure.

Local 11, T.E.C.A., 475 F.2d 1204, 1209 (1973); *Plumbers Local 519* v. *Construction Industry Stabilization Committee*, T.E.C.A., 479 F.2d 1052, 1056 (1973); *Baldwin County Electric Membership Corp.* v. *Price Commission*, T.E.C.A., 481 F.2d 920, 923, *cert. denied*, 414 U.S. 909 (1973); *Pacific Coast Meat Jobbers Association, Inc.* v. *Cost of Living Council*, T.E.C.A., 481 F.2d 1388, 1392 (1973); *Murphy* v. *O'Brien*, *supra*, p. 674; *City of Groton* v. *Federal Power Commission*, T.E.C.A., 487 F.2d 927, 934 (1973); *United States* v. *Ohio*, T.E.C.A., 487 F.2d 936, 941 (1973), *cert. granted*, U.S. (Feb. 19, 1974). See also, *United States* v. *Lieb*, T.E.C.A., 462 F.2d 1161, 1166 (1972), decided prior to *USC*.

In arguing that *Meat Cutters* and *USC* were wrongly decided, the Falcons offer five contentions which form the principal issues common to all three cases now under consideration:

(1) Properly interpreted, Executive Order 11615 does not forbid these price increases;

(2) The Economic Stabilization Act of 1970, as it existed during Phase I, represents an unconstitutional delegation of legislative authority to the executive branch of the Government;

(3) Executive Order 11615 violated §202(b) of the Economic Stabilization Act;

(4) Executive Order 11615 and the regulations issued thereunder violated §553 of the Administrative Procedure Act; and

(5) The application of Executive Order 11615 to forbid these price increases represents (a) an unconstitutional bill of attainder or *ex post facto*

law; (b) an unconstitutional taking of property without just compensation; and (c) an unconstitutional deprivation of due process of law.

No. 5-6 raises a sixth issue, namely, whether either the 1970 Act or the December 22, 1971 amendments thereto[6] (the 1971 Amendments) created a private right of action to recover for Phase I price violations occurring prior to the enactment of the amendments.

Issues 1 and 2 only were actually litigated in *USC* and *Meat Cutters*. With respect to such issues, the Falcons urge that we overrule *USC* and refuse to follow *Meat Cutters*. The Falcons have mounted their attack with skill and resolve, as evidenced by their principal brief of 155 pages. Still, we are not persuaded. We have concluded that the Falcons violated a lawful Executive Order issued pursuant to a constitutional statute, and that the ticket price increases must be refunded.

We have further concluded in No. 5-6 that violations of the Order which occurred during the Phase I freeze period are not subject to private actions by individuals or class plaintiffs.

I

Executive Order 11615 and the relevant regulations and interpretations issued thereunder are fully described in the *USC* opinion, 472 F.2d at 1066-1067.

[6] Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743.

We have set out the pertinent section of the Order below.[7] In brief, the Order established a 90-day freeze on prices, rents, wages and salaries, effective August 15, 1971. Permissible price levels were to be determined by reference to the nearest preceding 30-day period during which a "substantial volume of active transactions" had occurred. Since the Falcons had not played any home football games during the 30 days preceding August 15, the definition of "actual transactions" became crucial in determining proper "ceiling price" for their upcoming games. If a football game "transaction" did not "occur" until the games were actually played, the ticket price charged during the 1970 season would establish the proper ceiling price for 1971 games.

Cost of Living Council Order No. 1, 36 Fed. Reg. 16215 (Aug. 20, 1971), delegated the CLC's authority to implement the Order to the OEP. Subsequently, the

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[7] "Section 1. (a) Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise."

OEP issued Economic Stabilization Regulation No. 1, 36 Fed. Reg. 16515 (Aug. 21, 1971) which elaborated on the requirements of Executive Order 11615, but was nevertheless "very brief and basic in content." *USC* at 1067. The Regulation defined various terms contained in the Order and Regulation, but did not define the phrase, "actual transactions." By amendment dated August 24, 1971, the Regulation announced that the OEP would from time to time issue "circulars containing implementing instructional material." Circular No. 7, issued September 2, stated that a service transaction occurs "when the service is performed." Nine days later, in Circular No. 11, the OEP issued the statement which was to become the focal point of the *USC* case:

> "The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze."

In *USC* we held that the "implied assertion that a sporting event constituted a service," and the conclusion in Circular No. 11 that the freeze applied to advance sale tickets for sporting events, represented "a reasonable and consistent interpretation of the Executive Order, and one entitled to this court's respect." 472 F.2d at 1072.

1. Did USC correctly interpret Executive Order 11615?

The Falcons advance two interpretative arguments. First, they argue that the sale and delivery of the season tickets prior to August 15 constituted completed transactions within the meaning of the Execu-

tive Order and Regulation. If so, the Falcons would have been entitled both to retain the full amounts already received and to charge an equally high price for tickets sold after August 15 (since the pre-freeze sales would have established the proper ceiling price). Second, in the alternative, they contend that irrespective of whether a higher ceiling price was established prior to August 15, the Falcons did not "charge, assess or receive" a price after August 15 with respect to some 41,000 season tickets and therefore the prices of those tickets were exempt from the freeze.

It is conceded that *USC* fully disposed of the first argument adversely to the Falcons. As for their second contention, the Falcons urge that the *USC* court was not presented with the precise argument here put forward. In fact, in Part IV of *USC*, pp. 1069-1070, the court specifically considered and rejected a retroactivity argument. While it is unclear whether the words "charge, assess, or receive" were there given the forceful emphasis accorded them by the Falcons, it is beyond dispute that *USC* undertook to authoritatively interpret the Executive Order in light of a nearly identical set of facts. The Falcons have not brought to our attention any additional factors (such as legislative history) which were not presented in *USC*. They rely entirely upon the text of the Order itself, the relevant portion of which comprises a single paragraph. Under these circumstances, *USC* must be regarded as dispositive of both interpretative arguments here raised.

We subscribe fully to the reasoning and holding of *USC*, and deem it unnecessary to repeat what was set forth in that opinion. In light of the Falcons' strenuous effort to upset *USC*, and because of one factual dif-

ference based on the Falcons' status as a *professional* football team, some additional comments directed to two of their arguments are nevertheless appropriate.

First: The Falcons generally urge that the OEP position with regard to ticket prices was inconsistent with its rulings in other areas, *e.g.*, university tuition, and that even the ticket price policy was reversed for purposes of Phase II. The identical arguments were considered and rejected in *USC* (pp. 1071-1072). We merely note that when the agency was again required to implement a general price freeze at the outset of Phase IV, as opposed to the more flexible systems of controls represented by Phase II, it once again interpreted the freeze to apply to advance ticket sales. See CLC Freeze Group Questions and Answers Release No. 4, 38 Fed. Reg. 16651 (1973); and *cf. Murphy* v. *O'Brien*, *supra.*

The Falcons also contend that they were subject to a particular inconsistency with regard to the salaries paid to their football players. Falcons players were employed under two separate contracts. The first was a collective bargaining agreement negotiated by the players' union, the NFL Players Association. This agreement established, *inter alia*, the pay schedule for the 1971 pre-season "exhibition" games. The second agreement was the "standard player contract," the salary provisions of which varied and which were negotiated on an individual player basis. The standard player contract provided compensation for the players' services during the regular season of football play. Prior to August 15, the Falcons agreed to pay $117,300 in increased salaries under standard player contracts.

Sometime subsequent to September 7, 1971, OEP Director George A. Lincoln issued an interpretative ruling to the NFL Players Association. The ruling recited that "[a]ccording to a decision of the CLC on September 7, 1971," players who were already in training camps prior to August 15 under 1971 standard player contracts were entitled to receive any increases prescribed therein. We have not been informed of any effort by the Falcons to contest this ruling. The Falcons now argue, however, that the ruling has placed the OEP "in the incongruous position of advocating a price freeze on the sale of tickets without a corresponding wage freeze on the salaries of the players who performed in the same games."

In *USC*, we stated that "[i]f the haste necessitated [by the freeze] gave rise to unreasonable inconsistencies in the administrative interpretations, or to actions plainly without the purpose and scope of the Order, then we will readily rectify them." 472 F.2d at 1069. We cannot say that the alleged disparity here represents an unreasonable inconsistency in the agency's administration of the Order. It is clear that the standard player contract was not limited to the regular football season.[8] Conversely, in addition to setting

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[8] Paragraph 1 of the contract provides that "[t]he term of this contract shall be from the date of execution hereof * * *." The OEP ruling was expressly limited to players "who have signed 1971 contracts." Paragraph 2 of the contract recites the player's agreement "during the term of this contract to report promptly for the Club's training sessions and, at the Club's direction, to render his full time services during such training sessions and to participate in all practice sessions and in all League and other football games scheduled for or by the Club." Further, Paragraph 3 ex-

salaries for preseason games, the collective agreement established minimum salaries for the regular season as well. The collective agreement contemplated, and indeed required, the signing of individual standard player contracts. The two agreements thus covered different aspects of a single period of employment. Under the OEP ruling, salary provisions contained in the player contracts escaped the freeze only if performance of this single employment service was begun prior to August 15. In sum, the continuing service required of a football player under these contracts is sufficiently different from the discrete services performed by the Falcons — *i.e.*, performance of football games — to justify this result.

Second: The Falcons argue that *USC* erroneously focused on the provisions of the Executive Order which relate to ceiling price, and ignored the portion of the Order which describes the actual conduct to be prohibited. The language relied upon is contained in the third sentence of §1(a) of the Order, quoted *supra* n. 7. In pertinent part, the third sentence provides that "[n]o person shall charge, assess, or receive * * * in any transaction prices * * * in any form higher than those permitted hereunder * * *." Closely related to this contention is the argument that *USC* erred in according "great deference" to an agency interpretation which is in alleged conflict with the clear meaning of the quoted language. That meaning, the Falcons assert, is that prices which have been fully collected prior to August 15 are beyond the Order's reach.

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pressly provides that the Club shall pay board, lodging and travel expenses for away-from-home training or games during the pre-season period.

We begin by emphasizing that there is textual support for the OEP's interpretation of the Order, the Falcons' contention to the contrary notwithstanding. The Order proscribes higher prices "in any transaction." For ceiling price purposes, the Order expressly looks to prices "pertaining to * * * actual transactions." It is not unreasonable to construe the third sentence of the Order to incorporate this same concept, *i.e.*, to proscribe higher prices which pertain to future transactions, even though payment may already have been conditionally received. Just as a service transaction may reasonably be said to "occur" at the time of performance, a price may be deemed to be "charged" as of that same date. *Cf.* CLC Release No. 4, *supra*, 38 Fed. Reg. 16651. This is particularly true when it is realized that under the Falcons' alternative interpretation, patrons who had purchased tickets well in advance of the freeze would pay higher prices to sit side by side with fans who bought tickets after August 15. Thus, even if we were to yield to the Falcons' insistence that we interpret the Order *de novo*, it is not at all clear that we would reach a result different from that of the *OEP*.

The point of *USC* was that such a *de novo* analysis by the courts is both unnecessary and improper. "In delegating to the agencies the duty to develop the very definitions of the words used in the Order, the broadest possible delegation of power was given." *USC* at 1068. The delegation by the 1970 Act itself was no less broad. Congress, in §202(a), had said only that prices might not be reduced below the levels of May 25, 1970.[9] See

[9] "§202. Presidential authority

(a) The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize pric-

USC at 1070. It is no abdication of our constitutional role for this court to recognize the breadth of the delegations involved in this particular statute and this particular Order. The Supreme Court has stated in the context of an earlier price control statute that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).[10] As discussed above and as fully explained in *USC*, Circular No. 11 was not "plainly erroneous or inconsistent" with Executive Order 11615. Accordingly, we hold once again that such ticket price increases violated the Executive Order.

2. Was the 1970 Act an unconstitutional delegation of legislative power?

Relying upon *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 239 U.S. 388 (1935), the Falcons urge that the 1970 Act is void as representing an un-

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es, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities."

[10] The Falcons emphasize that the cited quotation is followed by this sentence: "The legality of the result reached by this process, of course, is quite a different matter." The "legality" referred to is the regulation's validity under the enabling statute and the Constitution. 325 U.S. at 414, 418-419. As noted above, the Act itself requires only that prices be stabilized at levels not below those of May 25, 1970. The *constitutional* validity of the Order as interpreted and applied is discussed elsewhere in this opinion.

constitutional delegation of legislative power to the President. It is conceded that subsequent to *Schechter*, no federal statute had been held unconstitutional by the Supreme Court on that basis. Among the statutes to survive a delegation challenge was the Emergency Price Control Act of 1942. *Yakus* v. *United States*, 321 U.S. 414 (1944).

In *Amalgamated Meat Cutters & Butcher Workmen* v. *Connally*, D.D.C., 337 F. Supp. 737 (1971), *supra*, a three-judge district court upheld the 1970 Act in the face of a delegation challenge. Several other district courts have reached the same result.[11] The exhaustive and learned opinion by Judge Leventhal in *Meat Cutters* has been favorably cited by this court on several occasions. See *United States* v. *Lieb*, *supra*, p. 1165; *USC*, *supra*, p. 1070; *IBEW Local 11* v. *Boldt*, T.E.C.A., 481 F.2d 1392, 1395, *cert. denied*, 414 U.S. 1092 (1973). It appears, however, that this is the first occasion upon which our court has been called to directly decide the delegation question. This likely is due in part to the fact that the 1971 Amendments appear to have eliminated any doubt as to the Act's validity under Article I of the Constitution.

We are in substantial agreement with the reasoning of *Meat Cutters*, and concur in the result there reached. It would serve only to unduly prolong this opinion were we to further elaborate our views on this subject. Accordingly, on the authority of *Meat Cutters*, we hold that the Economic Stabilization Act of 1970,

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[11] See, *e.g.*, *California Teachers Association* v. *Newport Mesa Unified School District*, C.D. Calif., 333 F. Supp. 436, 446-447 (1971); *United States* v. *Cincinnati Transit, Inc.*, S.D. Ohio, 337 F. Supp. 1068, 1072 (1972).

as it existed on August 15, 1971, was not an unconstitutional delegation of legislative power to the President.

3. Did Executive Order 11615 violate §202(b) of the Economic Stabilization Act?

As originally enacted on August 15, 1970, the Economic Stabilization Act did not restrict the President's authority to institute selective economic controls. Accordingly, on March 29, 1971, the President issued Executive Order 11588, 36 Fed. Reg. 6339, which provided for the stabilization of wages and prices in a single industry (the construction industry). Less than two months later, Congress amended §202 of the 1970 Act to add the following provision:

> "(b) The authority conferred on the President by this section shall not be exercised with respect to a particular industry or segment of the economy unless the President determines, after taking into account the seasonal nature of employment, the rate of employment or underemployment, and other mitigating factors, that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages have increased in the economy generally." Pub. L. 92-15, 85 Stat. 38 (May 18, 1971).

This provision remained in effect until the enactment of the 1971 Amendments on December 22, 1971. No comparable provision was retained in the amended Act.

The Falcons argue that Executive Order 11615 violated §202(b) because (1) the Order affected "a particular industry or segment of the economy" only, and (2) no prior determination was made by President that prices or wages in the affected segment increased at a rate which was grossly disproportionate to the rate at which prices or wages increased in the economy generally. The parties stipulated that the following segments of the economy were not subject to regulation under the Order: (1) raw agricultural products, (2) exports, (3) interest rates, (4) corporate stocks and bonds and municipal bonds, and (5) corporate dividends. On brief, the Falcons assert that the excluded segments represent business receipts during 1971 of 555 billion dollars, or approximately 20 per cent of total business receipts in the United States. The parties have further stipulated that at the time of the issuance of Executive Order 11615, the President did not determine that prices and wages affected by the Order had increased at a grossly disproportionate rate when compared with the economy generally.

We initially note that of the five listed exempt categories, only raw agricultural products were expressly excluded by the Order. Prices of exports and stocks were first exempted by OEP Regulation No. 1, pursuant to the agency's authority under §4(a) of the Order to grant exemptions. 36 Fed. Reg. at 16515. Interest rates and corporate dividends were not subject to the freeze because they were not "prices, rents, wages, or salaries" within the meaning of the Act and the Order. See OEP Circular Nos. 1 and 3, 36 Fed. Reg. 16587 and 17345 (1971); and see Conf. Rep. No.

91-1386, 91st Cong., 2d Sess., p. 7 (1970).[12] Since §202(b) refers only to the rate at which "prices or wages" have increased in the economy generally, the relevance of economic data pertaining to dividends and interest is questionable.

In any event, in light of both the language of §202(b) and the legislative purpose behind its enactment, the Falcons' contention is without merit. Even if 80 per cent of the economy may be literally regarded as a "segment" of the entire economy, it surely is not a "particular * * * segment" within the meaning of §202(b). It would be anomalous to require a finding that wages and prices comprising 80 per cent of the economy had increased at a rate "grossly disproportionate" to such increases in the "economy generally." Finally, the Report of the Senate Committee on Banking, Housing and Urban Affairs relative to §202(b) confirms that the finding requirement was directed only at the imposition of controls over relatively small segments of the economy:

> "The committee has serious reservations about applying the price and wage control authority *to a single industry.* An industry subject to price controls has no control over the price it must pay for the products of other industries. Likewise, workers subject to wage controls have no protection against a continued rise in the cost of living. * * *
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> "As a restriction on using the wage-price control authority *on a single industry,* the committee

[12] Interest and dividends subsequently were brought within the Act's coverage by §§ 202 and 203(a)(2) of the 1971 Amendments.

approved an amendment requiring a specific finding by the President. Under the amendment, the President is prohibited from using the authority *in a single industry* unless he determines that wages or prices in that industry have increased at a rate which is grossly disproportionate to the rate for the economy as a whole, after taking into account any mitigating factors such as the seasonal nature of employment or the rate of unemployment or under employment in the particular industry." S. Rep. No. 92-89, 92d Cong., 1st Sess., 1 U.S. Code Cong. & Admin. News 1971, pp. 1048-1049 (emphasis added).

Since §202(b) does not apply to the controls instituted by Executive Order 11615, the President's action need only fall within the general authority conferred by §202(a), *supra*. Such section clearly authorized the imposition of controls over something less than the entire economy.

4. Did Executive Order 11615 and the regulations thereunder violate the Administrative Procedure Act?

The Falcons contend that Executive Order 11615, CLC Order No. 1, and OEP Regulation No. 1 were issued without observance of procedures required by §4 of the Administrative Procedure Act (APA), 5 U.S.C. §553. In pertinent part, §553 provides as follows:

"(b) General notice of proposed rule making shall be published in the Federal Register * * *.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making * * *.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, * * *."

No general notice of proposed rule making preceded the issuance of any of the orders or regulations here challenged. Further, neither Executive Order 11615 nor CLC Order No. 1 contained an express finding, accompanied by reasons, that "notice and public procedure * * * are impracticable, unnecessary, or contrary to the public interest." OEP Regulation No. 1 did contain such a finding, but only by virtue of an amendment to the Regulation dated November 12, 1971, *i.e.*, one day before Phase I was to expire.

Since each of the three challenged actions raise somewhat different problems, we shall treat them separately.

a. Executive Order 11615

The first question raised by the Executive Order is whether the President is an "agency" within the meaning of the APA. The case for subjecting the President to the provisions of APA is a strong one.[13] Courts have shown some reluctance to decide the question, however, in view of potential ramifications under the Freedom of Information Act,[14] see *Soucie* v. *David*, D.C. Cir., 448 F.2d 1067, 1073 (1971), and the judicial review provisions of the APA,[15] see *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, D.D.C., 366 F. Supp. 51, 58 (1973). Upon this certification the Government has not made known its position with regard to this important question. We shall therefore assume, *arguendo*, that the President is an agency within the meaning of the APA.

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[13] 5 U.S.C. §551 defines "agency," for purposes of §§ 551-559, to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include — (A) the Congress; (B) the courts of the United States; * * * ." "The President" is not in terms excluded. In view of the glaring exclusion of two of the three principal branches of the Government, an intention not to exempt the President may be readily inferred. *Cf.* the Federal Register Act, 44 U.S.C. §1501 *et seq.*, in which "agency" is defined by listing included offices, and where "the President" is included and "the legislative or judicial branches of the Government" are excluded. In *Meat Cutters, supra*, Judge Leventhal without deciding the question cited three leading scholars for the proposition that "the term 'agency' in the APA includes the President." 337 F. Supp. at 761.

[14] 5 U.S.C. §552.

[15] 5 U.S.C. §§ 701-706. As is here relevant, the definition of "agency" contained in §701 is identical to that in §551.

The issue thus becomes whether we must set aside the Order for failure to conform with the procedural requirements of 5 U.S.C. §553. In *Meat Cutters, supra,* these requirements were recognized but were deemed to be of little practical consequence in view of the exception provided by §553(b)(B), *supra,* 337 F. Supp. at 761. The problem here cannot be so easily dismissed since the Government has stipulated that the finding required to invoke the exception was not made.

At the outset, we are satisfied that there was in fact "good cause" to find that advance notice of the freeze was "impracticable, unnecessary, or contrary to the public interest" within the meaning of §553(b)(B). This conclusion is based upon facts so obvious that they may be judicially noticed. Had advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct "actual transactions"—or avoid them—before the freeze deadline. Each price increase would have generated further increases in a growing spiral of inflation. We note in this connection the remarks of George P. Schultz, Director of the Office of Management and Budget, made during the course of an August 15, 1971 press conference, immediately prior to the President's announcement of the freeze:

> "* * * It is very difficult for the people in the administration to talk publicly about something like a wage-price freeze or something of that kind because immediately people raise their prices. In fact, I would say — and I don't have any really strong evidence to this effect — but I would say that the very large increase in the industrial component of the wholesale price index in July that

was reported a week or so ago probably reflects a reaction to all of the talk, with people putting their list prices up. * * *"[16]

While the legislative history of the 1970 Act does not reveal consideration of the problem discussed by Director Schultz,[17] it is clear that Congress anticipated the need for abrupt action in dealing with inflation. The Report of the House Committee on Banking and Currency repeatedly refers to the President's power under the Act as "standby authority." H.R. Rep. No. 91-1330, 91st Cong., 2d Sess., pp. 9, 11, 20 (1970). It would appear that a major factor in the decision of Congress to delegate such authority was its belief that only the Executive could properly react to day-to-day changes in the economy.[18] The psychological value of a "dramatic" initiation of controls appears also to have been contemplated. *Meat Cutters*, *supra*, p. 752. And although not phrased in terms of a finding for purposes of §553(b)(B), *supra*, the preamble to the Or-

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[16] CCH Economic Controls ¶8367, p. 8406 (1972).

[17] The House Committee on Banking and Currency subsequently did acknowledge this reason for secrecy in connection with Phase I, however. See H.R. Rep. No. 92-714, 92d Cong., 1st Sess., p. 4 (1971).

[18] In response to criticism that the freeze should be instituted by Congress directly, and not by the President, the Committee Report states: "[A wage-price freeze] is not a legislative function, both in terms of appropriate timing in instituting the controls and removing them, since only the Executive can determine the appropriate time for instituting the controls and removing them * * * ." Further: "if the Congress had mandated such action through to the termination date [of the Act], it would well be days or weeks before such action would be rescinded by the Congress if needed * * * ." H. R. Rep. No. 91-1330, *Supra*, p. 11.

der itself refers to another ground for urgency: "Whereas, the present balance of payments situation makes it especially urgent to stabilize prices, rents, wages, and salaries * * *."

The Falcons argue that because (1) the Government has stipulated that no finding was made, and (2) no finding and statement of reasons was incorporated in the Executive Order, the Order should now be set aside. We cannot agree that Congress intended to visit such consequence upon a technical violation of §553(b) where the reasons for exempting the President's action from the notice requirement are so obvious and compelling. *Cf. Appalachian Power Co.* v. *Environmental Protection Agency*, 4 Cir., 477 F.2d 495, 502-503 (1973); *Duquesne Light Co.* v. *Environmental Protection Agency*, 3 Cir., 481 F.2d 1, 8 (1973). A failure to incorporate in rules a statement of basis and purpose, in technical violation of §553(c), has been held not to void the rules where "[b]oth the basis and purpose are obvious from the specific governing legislation and the entire trade was fairly apprised of them by the procedure followed." *Hoving Corp.* v. *Federal Trade Commission*, 2 Cir., 290 F.2d 803, 807 (1961). In both cases upon which the Falcons principally rely,[19] the inquiry was quite properly directed at whether the agency in fact had good cause to bypass the notice requirement. We hold that Executive Order 11615 did not violate §4 of the Administrative Procedure Act.

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[19] *Texaco, Inc.* v. *Federal Power Commission*, 3 Cir., 412 F.2d 740 (1969); *Kelly* v. *Dept. of Interior*, E.D. Calif., 339 F. Supp. 1095 (1972).

b. CLC Order No. 1

On August 17, 1971, the CLC issued its Order No. 1 under the title, "Delegation of Authority." 36 Fed. Reg. 16215. The Order consisted of five brief paragraphs. The first and second paragraphs delegated the CLC's authority under §§ 1, 4(a), 5 and 7 of Executive Order 11615 to the Director of the OEP. Paragraph 3 of Order No. 1 directed executive departments and agencies to assist the Director pursuant to 31 U.S.C. §691; paragraph 4 required consultation with the CLC on significant policy decisions; and paragraph 5 permitted the Director to redelegate the authority thereby conferred.

Section 553(b)(A) excepts, *inter alia*, "rules of agency organization, procedure, or practice" from the notice requirement of §553. Nothing contained in CLC Order No. 1 goes beyond the matters thus excluded. Accordingly, Order No. 1 did not violate the APA.

c. OEP Regulation No. 1

The bulk of OEP Regulation No. 1 merely rephrases and interprets the Executive Order. Indeed, section 1 of the Regulation states that the Regulation's purpose is to "promulgate initial guidance and procedures" for implementing the freeze. To the extent that the Regulation is thus an "interpretative rule," it falls within the exception to §553 provided by §553(b)(A). To the extent that it arguably may prescribe non-exempt rules (none of which would appear to affect the Falcons in this case), the considerations previously set forth with respect to the Executive Order

apply with equal force to the Regulation. We thus need not decide whether the amendment to the Regulation dated November 12, 1971, which was nothing more than a *pro forma* statement of the obvious,[20] could retroactively cure a technical flaw in the rule.

5. Additional constitutional questions: Does Executive Order 11615 as applied represent an ex post facto law or bill of attainder, a taking of property without just compensation, or a denial of due process of law?

The Falcons finally advance a variety of constitutional arguments relating to the allegedly retroactive nature of the Executive Order as here applied. Similar arguments on previous occasions have been uniformly rejected by our court. See *USC*, *supra*, p. 1070; *IBEW Local 11* v. *Boldt*, *supra*, p. 1395 (just compensation); *Western States Meat Packers Association, Inc.* v. *Dunlop*, T.E.C.A., 482 F.2d 1401, 1403-1404 (1973) (just compensation); see also, *Meat Cutters*, *supra*, pp. 763-764 (due process); *Taylor* v. *Brown*, Emer. Ct. App., 137 F.2d 654, 659-660, *cert. denied*, 320 U.S. 787 (1943) (*ex post facto*, just compensation).

The Falcons argue from the assumption that their rights in the season ticket sale proceeds were "vested" and "unqualified" as of August 15, 1971. Such assumption is faulty inasmuch as the Falcons concede, elsewhere in their brief, that if the games had not been

[20] "Because of the need for prompt determinations, notice of proposed rule making and public procedure thereon have been found to be impracticable and contrary to the public interest." 36 Fed. Reg. 21761 (1971).

performed they would have been liable for the purchase price. See, *e.g.*, *De La Ysla* v. *Publix Theatres Corp.*, 26 P.2d 818 (Utah 1933). The authorities cited by the Falcons do not so much indicate that a ticket is not a contract, as hold that the seller's duty and the remedies for breach thereof are limited. A ticket does not create an irrevocable right of entry, *Marrone* v. *Washington Jockey Club*, 227 U.S 633 (1913), nor does it warrant against personal injuries, *Jordan* v. *Concho Theatres, Inc.*, 160 S.W.2d 275 (Tex. Civ. App. 1941). We are cited to no case, however, which indicates that the Falcons could refuse to perform the scheduled games with impunity on the ground that their prior rights were "unqualified."[21]

It is well settled that Congress may interfere with private contractual obligations where such interference is a necessary incident of otherwise valid legislation. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-311 (1935); *Louisville & Nashville R. Co.* v. *Mottley*, 219 U.S. 467, 480-483 (1911); *USC*, *supra*, p. 1070. That one of the contracting parties may have completely performed his obligations does not remove this "congenital infirmity" (*Norman*, *supra*, p. 308) which is a part of every contract subject to Congressional power. *Louisville & Nashville R. Co.* v. *Mottley*, *supra*.

As for the *ex post facto* clause, the Order cannot be said to *punish* the Falcons for prior conduct within the meaning of such cases as *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1809), and *Cummings* v. *Missouri*, 71

[21] Contrast *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935), holding that a statute which deprived mortgagees of substantial existing rights in specific mortgaged property violated the Fifth Amendment.

U.S. (4 Wall.) 277 (1867). See also, *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798). Neither is the Order a bill of attainder, see *United States* v. *Brown*, 381 U.S. 437, 447 (1965). It is true that §204 of the 1970 Act prescribes fines for willful violations. However, the Government has sought only an injunction and restitution under §205, for which there is no requirement of willfulness, and none of the letters or telegrams referred to in the Falcons' complaint threaten criminal action or accuse the Falcons of willful wrongdoing. In *Manning* v. *University of Notre Dame Du Lac*, T.E.C.A., 484 F.2d 501, 503-504 (1973), on nearly identical facts, we indicated that the violation likely was not willful within the meaning of §208(a) of the amended Act (the successor to §204). In any event, any fine which might be imposed would be based upon willful conduct which occurred after the effective date of the Order.

II

No. 5-6 arises out of plaintiff Burt DeRieux's purchase of four Atlanta Falcons season tickets in June 1971. On August 27, 1971, DeRieux by letter demanded the return of $1.50 per ticket per game; the demand was rejected by the Falcons on September 2. Thereafter, on September 10, DeRieux filed the present class action on behalf of all Falcons season ticket holders. DeRieux's action preceded by seventeen days the Government's suit for injunction and restitution (No. 5-8).[22]

[22] DeRieux alleges that the Government instituted its enforcement action only as a result of his persistent protests, which included the August 27 letter to the Falcons, a complaint with the Internal Revenue Service dated September 9 and, shortly thereafter, the present lawsuit.

Both the original and first amended complaints alleged that the action arose under the Economic Stabilization Act of 1970, and invoked federal jurisdiction under 28 U.S.C. §1331.[23] The complaints recognized, however, that the plaintiff sought relief "not provided for in the Economic Stabilization Act, Executive Order 11615, or in any other administrative forum, and which only this Court can grant." By amendment to the complaint, filed July 23, 1973, DeRieux alleged for the first time that his claim was based upon §210 of the amended Act.[24]

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[23] Apparently recognizing the jurisdictional problem posed by *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), DeRieux now additionally claims that jurisdiction is conferred by 28 U.S.C. § 1337, under which there is no requirement of a $10,000 minimum amount in controversy.

[24] "§210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of

The amendment further alleged that the Falcons "have and continue to willfully refuse to refund the amount due * * * despite the decision of the Temporary Emergency Court of Appeals in [*USC*]." Finally, the amendment sought treble damages in the amount of $1,140,000.00, attorneys fees and costs pursuant to §210(b) of the amended Act.

The principal question now presented is whether either the 1970 Act or §210 of the amended Act create a private right of action for Phase I violations which occurred prior to December 22, 1971, the date on which §210 was enacted.

In terms, the 1970 Act, in §205, provided only for injunctive relief in actions brought by an agency of the United States:

> "Whenever it appears to any agency of the United States, authorized by the President to exercise the authority contained in this section * * * that any person has engaged, is engaged, or is about to engage in any acts or practices con-

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such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, that where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title."

> stituting a violation of any regulation or order under this title, it may in its discretion bring an action * * * to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the agency, any such court may also issue mandatory injunctions commanding any person to comply with any regulations or order under this title."

Section 7(b) of the Executive Order conferred upon the CLC the authority "in its discretion" to request the Department of Justice to bring actions for injunctions under §205.

Faced with the absence of any express authority for a private right of action under the 1970 Act, DeRieux argues that such a right may be implied from the purposes and policies of the Act. See *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). More specifically, the argument is that "the class's claim is within the scope of the very rights which the statute and the Executive Order were attempting to protect." The purpose of the Act, DeRieux argues, was "to protect consumers from an increase in prices."

The question of implied private rights of action was most recently the subject of Supreme Court review in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, U.S. (No. 72-1289, Jan. 9, 1974). There, the Court undertook to construe §307(a) of the Amtrak Act," 45 U.S.C. §547(a). Section 307(a) authorized enforcement actions by the Attorney General and, in cases involving a

labor agreement, by affected employees or their representatives. After examining legislative history and the policies of the Act, the Court concluded that §307(a) provided the exclusive remedies for violations and that no additional private right of action could properly be inferred.

In some respects, the problem in *Railroad Passengers* was different than that posed by §205 of the Economic Stabilization Act. Since the Amtrak Act expressly authorized some private actions (by employees under a labor agreement), the maxim *expressio unius est exclusio alterius* applied with particular force to other private actions not so authorized. In addition, in drafting the final Amtrak bill Congress had considered and rejected a proposal to permit suits by any "aggrieved person." Our review of the legislative history of the Economic Stabilization Act of 1970 has failed to reveal any specific consideration of proposals to create or limit private rights of action.[25]

We are not left totally without guidance, however. In interpreting the 1970 Act, the provisions of prior economic controls legislation are significant. *Meat Cutters, supra*, p. 748. Both the Emergency Price Control Act of 1942 and the Defense Production Act of 1950 provided for private damage actions in addition to Government suits for injunctions and fines. 56 Stat. 23, 34; 64 Stat. 798, 811. The similarity in

[25] The adequacy of the Act's enforcement provisions were challenged, however, both in hearings and on the floor of the House. See Hearings on H.R. 17880 before the House Committee on Banking and Currency, 91st Cong., 2d Sess., pp. 83-84; 116 Cong. Rec. 26837 (1970) (remarks of Representative Anderson).

language between §205 and the injunction provisions of the two earlier statutes indicates that §205 was derived from those provisions; this is confirmed by the legislative history.[26] From this background of prior law, Congress surely was aware of the possibility of private enforcement, and its failure to expressly provide for private actions in the 1970 Act can only be regarded as intentional.

Further, an examination of the purpose of the 1970 Act supports the conclusion that the remedies contained in §205 were intended to be exclusive. Congress anticipated that the President would implement the Act by imposing a short term freeze of only two or three months' duration. H.R. Rep. No. 91-1330, *supra*, p. 9. The purpose of the anticipated freeze was to break the nation's "inflationary psychology" and to provide a breathing period during which longer term controls could be formulated. See *Meat Cutters*, *supra*, pp. 747-748, 751-752; Hearings on H.R. 17880, *supra* n. 25, pp. 6, 11-12. It is entirely reasonable that Congress would choose not to confer individual rights of action with respect to controls of such short duration and uncertain consequence.

The difference between the Economic Stabilization Act of 1970 and statutes under which an implied private right of action has been recognized is apparent. Unlike the Voting Rights Act of 1965,[27] the Securities

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[26] Remarks of Representative Reuss, Hearings on H.R. 17880, *supra* n. 25, pp. 5-6 (1970): "The language of title II is derived from the battle-tested language of the Emergency Price Control Act of 1942."

[27] See *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

Exchange Act of 1934,[28] or the Federal Safety Appliance Acts, [29] the Economic Stabilization Act was not designed to protect or confer "private rights" within the usual meaning of that phrase. Indeed, as the present case well illustrates, the effect of the Act and Order in many instances was destructive of private contract rights. Rather, the Act prescribed emergency medicine to remedy an affliction affecting the entire national economy. Individuals were ultimately sought to be benefitted, but as a consequence of overall economic stabilization. There was no intention to benefit a specific class. *Cf. Daly* v. *Columbia Broadcasting System, Inc.*, 7 Cir., 309 F.2d 83 (1962). Even when Congress amended the Act to provide for individual actions, in §210, its principal concern was deterrence and effective enforcement, and not the vindication of individual "rights" as such. See H.R. Rep. No. 92-714, 92d Cong., 1st Sess., pp. 8, 28 (1971). We conclude that a private right of action cannot be inferred from the 1970 Act.[30]

DeRieux next argues that even if no implied right of action was created by the 1970 Act, the December 22, 1971 amendments to the Act supplied the previously missing remedy. The question is whether §210 of the amended Act, *supra* n. 24, may be read to have retrospective effect.

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[28] *See J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

[29] See *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33 (1916).

[30] Accord, *ICA Southeast, Inc.* v. *Optimum Systems, Inc.*, E.D. La., CCH Economic Controls ¶9999A(1), p. 9991(1971). *Cf. Heavy Contractors Association, Inc,* v. *Operating Engineers Local 571*, D. Neb., 328 F. Supp. 897 (1971); and see *Acorn Iron & Supply Co.* v. *Bethlehem Steel Co.*, E.D. Pa., 96 F. Supp. 481 (1951).

If §210 were solely concerned with perfecting a remedy for previous violations of the law, it might well permit the construction here urged. See *Bradley* v. *Richmond School Board*, U.S. (No. 72-1322, May 15, 1974); *Koger v. Ball*, 4 Cir., F.2d (No. 73-2332, May 10, 1974). But the 1971 Amendments did more than merely make recovery more convenient or more certain. Section 210(b) provides for the awarding of a sum equal to the greater of (1) three times the amount of the overcharge, or (2) not less than $100 nor more than $1,000. Thus, the damages available under §210(b) are punitive in nature and substantially larger than those previously recoverable in Government actions for restitution. The amendment to the complaint here invokes these very provisions in seeking treble damages in excess of $1,100,000.

For this reason, we believe that §210 represents an exception to the general rule regarding retrospective application in pending cases of changes in the law. That rule, as recently articulated by the Supreme Court in *Bradley* v. *Richmond School Board*, *supra*, is that "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." Slip op. at 17-18. The *Bradley Court* was nevertheless careful to state that courts need not always apply intervening law in the absence of clear legislative direction to the contrary. Rather, exceptions should be drawn where application of the intervening statute would result in manifest injustice. The Court further indicated that the question of retrospective application was to be determined in each case by analysis of "(a) the nature and identity of the parties, (b) the nature of their rights, and (c)

the nature of the impact of the change in law upon those rights." *Id.* at 20.

Here, the decisive factor is the impact of §210 upon the Falcons' rights. Unlike the *Bradley* situation, where the intervening statute merely provided for an award of attorneys fees to which plaintiffs arguably already were entitled, the application of §210 would impose "an additional [and] unforeseeable obligation" in the form of potential treble damages. *Id.* at 24. Even though such an award is discretionary with the district court, its prospect alone might have caused the Falcons to order their conduct differently so as to avoid the risk. *Id.* at 23. In light of the new obligation imposed, §210 should not be construed to act retrospectively.[31]

This conclusion is fortified by the deterrent purpose of §210, above referred to. Only future conduct can be deterred. Further, where Congress desired that the 1971 Amendments apply to pending cases (or, by analogy, to previous violations), it did not lack for words to make such purpose clear. Compare §210(a), *supra* n. 24, with §211(a) and (h).[32] We do not read

[31] Accord, *Piaskoski* v. *Associated Hospital Service, Inc.*, E.D. Wis., 347 F. Supp. 470 (1972). See also, *United States* v. *St. Regis Paper Co.*, S.D. N.Y., 106 F. Supp. 286, 291 (1952) (amended regulation under Defense Production Act).

[32] "§211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder * * *.

* * *

(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date

Bradley to hold that evidence of legislative intent short of express statutory language is irrelevant to the retroactivity question, and we believe these factors are significant.

DeRieux finally argues that §210 applies prospectively to the Falcons' continuing refusal to refund the overcharges. Such contention was squarely rejected in *Manning* v. *University of Notre Dame Du Lac*, *supra*, where we held that the "overcharge" occurred, at the latest, at the time the football games were placed. The argument that the "legal wrong" language of §210(a) provides a separate basis for relief was also there rejected. 484 F.2d at 504.

It is true that *Manning* applied the provisions of §210 in a class action based upon a Phase I violation. *Manning* did not recognize or treat the threshold retroactivity issue, however, and is therefore in no way contrary to our disposition of this case. See *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

DISPOSITION

Pursuant to the authority granted by §211(c) and (h) of the Economic Stabilization Act of 1970, as amended, this court now makes the following disposition of these consolidated cases:

The complaint in No. 5-6 fails to state a claim upon which relief may be granted. Accordingly, No. 5-6 is

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of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title."

remanded to the district court with directions to dismiss the complaint.

In No. 5-7, defendants are entitled to judgment as a matter of law. No. 5-7 is therefore remanded to the district court with directions to enter judgment in accordance with this opinion in favor of defendants.

In No. 5-8, the United States is entitled to judgment as a matter of law. Accordingly, No. 5-8 is remanded to the district court with directions to enter judgment in accordance with this opinion in favor of plaintiff. The district court is further directed to determine and carry out such remedies as it may deem appropriate, including the amount and manner in which restitution should be made. See *University of Southern California* v. *Cost of Living Council*, *supra*, 472 F.2d at 1070; *Murphy* v. *O'Brien*, supra, 485 F.2d at 676, compare *Manning* v. *University of Notre Dame Du Lac*, *supra*.

REMANDED WITH DIRECTIONS.

ADMINISTRATIVE PROCEDURE ACT

§551. Definitions

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of reprsentatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50; appendix;

* * * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, pro-

cedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

* * * * *

§553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

EXECUTIVE ORDER No. 11615

August 17, 1971, 36 F.R. 15727

PROVIDING FOR STABILIZATION OF PRICES, RENTS, WAGES, AND SALARIES

WHEREAS, in order to stabilize the economy, reduce inflation, and minimize unemployment, it is necessary to stabilize prices, rents, wages, and salaries; and

WHEREAS, the present balance of payments situation makes is especially urgent to stabilize prices, rents, wages, and salaries in order to improve our competitive position in world trade and to protect the purchasing power of the dollar:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States including the Economic Stabilization Act of 1970 (P.L. 91-379, 84 Stat. 799), as amended, it is hereby ordered as follows:

Section 1. (a) Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly

or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

(b) Each person engaged in the business of selling or providing commodities or services shall maintain available for public inspection a record of the highest prices or rents charged for such or similar commodities or services during the 30-day period ending August 14, 1971.

(c) The provisions of sections 1 and 2 hereof shall not apply to the prices charged for raw agricultural products.

Sec. 2. (a) There is hereby established the Cost of Living Council which shall act as an agency of the United States and which is hereinafter referred to as the Council.

(b) The Council shall be composed of the following members: The Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Director of the Office of Emergency Preparedness, and the Special Assistant to the President for Consumer Affairs. The Secretary of the Treasury shall serve as Chairman of the Council and the Chairman of the Council of Economic Advisers shall serve as Vice Chairman. The Chairman of the

Board of Governors of the Federal Reserve System shall serve as adviser to the Council.

(c) Under the direction of the Chairman of the Council a Special Assistant to the President shall serve as Executive Director of the Council, and the Executive Director is authorized to appoint such personnel as may be necessary to assist the Council in the performance of its functions.

Sec. 3. (a) Except as otherwise provided herein, there are hereby delegated to the Council all of the powers conferred on the President by the Economic Stabilization Act of 1970.

(b) The Council shall develop and recommend to the President additional policies, mechanisms, and procedures to maintain economic growth without inflationary increases in prices, rents, wages, and salaries after the expiration of the 90-day period specified in Section 1 of this Order.

(c) The Council shall consult with representatives of agriculture, industry, labor and the public concerning the development of policies, mechanisms and procedures to maintain economic growth without inflationary increases in prices, rents, wages, and salaries.

(d) In all of its actions the Council will be guided by the need to maintain consistency of price and wage policies with fiscal, monetary, international and other economic policies of the United States.

(e) The Council shall inform the public, agriculture, industry, and labor concerning the need for con-

trolling inflation and shall encourage and promote voluntary action to that end.

Sec. 4. (a) The Council, in carrying out the provisions of this Order, may (i) prescribe definitions for any terms used herein, (ii) make exceptions or grant exemptions, (iii) issue regulations and orders, and (iv) take such other actions as it determines to be necessary and appropriate to carry out the purposes of this Order.

(b) The Council may redelegate to any agency, instrumentality or official of the United States any authority under this Order, and may, in administering this Order, utilize the services of any other agencies, Federal or State, as may be available and appropriate.

(c) On request of the Chairman of the Council, each Executive department or agency is authorized and directed, consistent with law, to furnish the Council with available information which the Council may require in the performance of its functions.

(d) All Executive departments and agencies shall furnish such necessary assistance as may be authorized by section 214 of the Act of May 3, 1945 (59 Stat. 134; 31 U.S.C. 691).

Section. 5. The Council may require the maintenance of appropriate records or other evidence which are necessary in carrying out the provisions of this Order, and may require any person to maintain and produce for examination such records or other evidence, in such form as it shall require, concerning prices, rents, wages, and salaries and all related mat-

ters. The Council may make such exemptions from any requirement otherwise imposed as are consistent with the purposes of this Order. Any type of record or evidence required under regulations issued under this Order shall be retained for such period as the Council may prescribe.

Sec. 6. The expenses of the Council shall be paid from such funds of the Treasury Department as may be available therefor.

Sec. 7. (a) Whoever willfully violates this Order or any order or regulation issued under authority of this Order shall be fined not more than $5,000 for each such violation.

(b) The Council shall in its discretion request the Department of Justice to bring actions for injunctions authorized under Section 205 of the Economic Stabilization Act of 1970 whenever it appears to the Council that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order issued pursuant to this Order.

RICHARD NIXON

THE WHITE HOUSE,
August 15, 1971.

EXCERPTS FROM STIPULATION OF FACTS

17.

At the time of the issuance of Executive Order No. 11615, neither the President nor any delegate acting on his behalf gave general notice of the intention to issue the Executive Order in the Federal Register or otherwise, nor gave interested persons (including defendant) an opportunity to submit written data, views or arguments, with reference to the Executive Order, nor conducted a hearing with respect thereto, nor made any finding that such notice and public procedure were impracticable, unnecessary or contrary to the public interest.

25.

(a) On August 24, 1971, the Director of OEP issued Circular No. 1 as a guideline which provided in pertinent part:

> The ceiling price for the sale of a commodity or service is the highest price at which a seller delivered or furnished during the base period such commodity or service to purchasers in a substantial number of transactions . . . . (36 Fed. Reg. 16586)

(b) On September 11, 1971, the Directors of the OEP issued Circular No. 11 as a guideline which provided in pertinent part:

> "The freeze applies to prices of advance sale of tickets for sporting events occurring during the freeze." (36 Fed. Reg. 18315).

(c) Neither the Director of the OEP, nor the OEP itself, nor any delegate of either of them, gave any general notice of an intention to issue the portion of Circular No. 11 quoted above in the Federal Register or otherwise, nor gave interested persons (including the Atianta Falcons) an opportunity to submit written data, views or arguments with respect thereto, nor did they make any finding at that time that such notice and public procedure were impracticable, unnecessary or contrary to the public interest.

In the Supreme Court of the United States

OCTOBER TERM, 1974

[illegible] INC., PETITIONER

v.

WILLIAM B. MELLAWAY,
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR MELLAWAY, MELLAWAY
AND THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2046

THE FIVE SMITHS, INC., PETITIONERS

v.

WILLIAM H. HOLLAWAY,
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR WILLIAM H. HOLLAWAY AND THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A-1 to A-39) is not yet reported. The case was certified to that court without opinion by the United States District Court for the Northern District of Georgia.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on June 20, 1974. The petition for a writ of certiorari was filed on July 19, 1974. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 750.

QUESTIONS PRESENTED

1. Whether technical non-compliance with Section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. 553, by the President in issuing Executive Order 11615, which imposed a 90-day freeze on prices, rents, wages and salaries, requires that the freeze be set aside.

2. Whether the administrative interpretations of the Office of Emergency Preparedness ("OEP") should be afforded great deference.

3. Whether the application of Executive Order 11615 to the sales of football-game tickets by petitioner constituted an *ex post facto* law or deprived petitioner of its property without due process of law.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, Section 9, clause 3 of the United States Constitution provides in pertinent part:

> No * * * ex post facto Law shall be passed.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall * * * be deprived of * * * property, without due process of law * * * .

Section 553 of the APA, 5 U.S.C. 553 (Pet. App. A-41 to A-42) and Executive Order 11615 (Pet. App. A-44 to A-48) are set forth in the Appendix to the petition for a writ of certiorari.

Circular No. 7 issued by the OEP (36 Fed. Reg. 17578) provides in pertinent part:

> A transaction takes place when the seller ships the product to the buyer, not when the order is

> received. In the case of a service, the transaction takes place when the service is performed.

Circular No. 11 issued by the OEP (36 Fed. Reg. 18315) provides in pertinent part:

> The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze.

STATEMENT

Petitioner owns and operates the Atlanta Falcons professional football team ("Falcons"). In January, 1971, the Falcons announced an increase that ranged from $1.50 to $2.50 per ticket in home game tickets for the 1971 football season. Approximately 41,500 season tickets for the 1971 season were fully paid for by the end of June, 1971, by patrons of the Falcons.

On August 15, 1971, the President issued Executive Order No. 11615 imposing a 90-day freeze upon prices, rents, wages and salaries. Under the Executive Order, prices were to be stabilized:

> at levels not greater than the highest of those pertaining to a substantial volume of actual transactions * * * of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. [Pet. App. A-44.]

The Falcons played no home games prior to August 15, 1971. If no actual transactions occurred during the 30-day period (July 16 - August 14, 1971) ending August 14, 1971, the highest price which could have been charged was:

> the highest price * * * in the nearest preceding 30-day period in which transactions did occur. [Pet. App. A-44.]

Additionally, the President established the Cost of Living Council ("Council") and authorized it to implement Executive Order No. 11615 (Pet. App. A-45 to A-48). The Council then authorized OEP to implement and administer the Executive Order.[1]

On September 2, 1971, the OEP as an interpretation of Executive Order No. 11615, issued Circular No. 7, which provided in pertinent part:

> A transaction takes place when the seller ships the product to the buyer, not when the order is received. In the case of a service, the transaction takes place when the service is performed.

The OEP issued a further interpretation in Circular No. 11, which provided in pertinent part:

> The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze.

The petitioners instituted suit in the United States District Court for the Northern District of Georgia and sought a declaration that Executive Order No. 11615 did not apply to its advance sale of football tickets for games played during the 90-day freeze and that, if it did, it was unconstitutional as an *ex post facto* law. The government also filed suit against petitioner seeking injunctive relief against the price increase.

The district court certified the constitutional issues raised by petitioner to the Temporary Emergency Court of Appeals under Section 211(c) of the Economic Stabilization Act of 1970, as amended.[2] The court of appeals ordered that all issues, both constitutional and non-

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[1] Cost of Living Council Order No. 1, 36 Fed. Reg. 16215.

[2] 85 Stat. 749.

constitutional, be presented for disposition under Section 211(c) of the Act.[3] The court of appeals held that setting aside the executive order is not a proper remedy, even assuming *arguendo* that the APA was applicable and violated (Pet. App. A-20 to A-25); that the Executive Order had been properly construed (Pet. App. A-9 to A-15); and that the Constitution had not been violated (Pet. App. A-15 to A-17, A-27 to A-29).

ARGUMENT

The same material facts and most of the issues presented in this case were before the Court in the petition for a writ of certiorari in *University of Southern California* v. *Cost of Living Council*, 472 F. 2d 1065 (T.E.C.A.), certiorari denied, 410 U.S. 928. As in *University of Southern California*, the decision of the court of appeals in the present case was correct and the petition presents no issue warranting review.

1. Petitioner contends that the President violated Section 553 of the APA when he issued Executive Order No. 11615 and imposed a 90-day freeze upon prices, rents, wages and salaries (Pet. 9-19). The government stipulated that the 30-day notice and comment period required by that Act was not afforded. Even if the APA is applicable to the President, however, the Presidential statement accompanying the rule was adequate compliance.

The APA requires advance notice of proposed rule making except "when the agency for good cause finds

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[3] Petitioner instituted *The Five Smiths, Inc.* v. *William H. Holloway* in the district court on September 23, 1971, and sought declaratory relief. The defendants in that action were government officials charged with the responsibility of implementing the 90-day freeze. The government filed an action against petitioner, *United States* v. *The Five Smiths, Inc.*, on September 25, 1971, and sought an injunction. The cases were consolidated by the court of appeals.

(and incorporates the finding and brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). Executive Order No. 11615 did not contain such a statement.[4] However, on August 15, 1971, the day the Executive Order was promulgated, the President addressed the nation over radio and television and described the urgent and immediate need to impose economic controls. 7 *Presidential Documents*, July 5 - December 27, 1971, 1168-74. This statement, made simultaneously with the Executive Order, constituted a finding of good cause that advance notice was impracticable, unnecessary, and contrary to the public interest. The court of appeals correctly held (Pet App. A-22 to A-25) that there was substantial compliance with the APA; the violation, if any, was the technical one of placing the finding of good cause to omit giving advance notice in an accompanying statement rather than in the Executive Order itself.

Furthermore, the legislative history of the Economic Stabilization Act of 1970 indicates that Congress foresaw the need for immediate action by the President to remedy the nation's economic problem. H. Rep. No. 91-1330, 91st Cong., 2d Sess., 9, 11, 20. A price freeze would be ineffective if, during a notice and comment period, prices could be raised in anticipation. Therefore the freeze without notice was altogether appropriate and within the spirit of both the APA and the legislation giving the President the power to impose it.[5]

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[4] But the preamble to the Executive Order specifically stated, in part, that "[w]hereas, the present balance of payments situation makes it especially urgent to stabilize prices, rents, wages, and salaries * * *."

[5] Congress contemplated a freeze to "check the inflationary psychology" as a means of stabilizing the economy. *Amalgamated Meat Cutters & Butcher Workmen* v. *Connally*, 337 F. Supp. 737, 750-752 (D.D.C.).

2. Petitioner further contends that the court of appeals erroneously afforded "great deference" to the interpretations issued by the OEP (Pet. 19-29). Whether or not "great deference" is appropriate, the court below was correct in accepting the OEP's interpretation. "[p]articularly * * * when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. In interpreting an administrative regulation, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414. *Accord, Udall* v. *Tallman*, 380 U.S. 1, 16.

The court of appeals did not "rubber-stamp" the decisions of the OEP. Rather, the court scrutinized the interpretation and, exercising independent judgment, concluded that the interpretation was within the range of reasonable constructions to which the court will defer.

3. Petitioner has also presented the question, without discussion, whether Executive Order No. 11615, as applied, is an *ex post facto* law or deprives petitioner of property without due process of law (Pet. 2). These contentions are not persuasive.

An *ex post facto* law punishes past conduct that was not unlawful when engaged in. *Calder* v. *Bull*, 3 Dall. 386; *Ex parte Garland*, 4 Wall. 333. Neither the Act nor the Executive Order "punishes" petitioner.

This Court in *Flemming* v. *Nestor*, 363 U.S. 603, upheld a statute under which old-age Social Security

benefits were terminated because the beneficiary was deported for having belonged to the Communist Party 20 years earlier. The Court stated the governing standards as follows (363 U.S. at 614):

> Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected.

Here, as in *Nestor*, the legislative concern is regulatory. Although the particular refund order may "bear harshly" upon petitioner, it does not inflict punishment.

Petitioner was not deprived of its property without due process of law. The regulation simply announced a rule to govern the prices at which future services could be provided. As long as there is a rational basis for the reglatory scheme, or if it is reasonable, there is no denial of due process of law. *Richardson* v. *Belcher*, 404 U.S. 78, 84. In *University of Southern California*, *supra*, 472 F. 2d at 1072, the court of appeals correctly held the administrative action in question here "to be a reasonable and consistent interpretation of the Executive Order * * *."

4. The administrative actions sought to be reviewed here were temporary measures extending only through the 90-day emergency freeze period in 1971. The Economic Stabilization Act expired in its entirety at midnight on April 30, 1974,[6] and there are only two other cases

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[6] 87 Stat. 29.

currently in litigation which involve the issues presented.* The issues relating to the Economic Stabilization Act and the validity of the implementing Executive Order and regulations therefore have little prospective importance.

CONCLUSION

For the foregoing reasons, it it respectfully submitted that the petition for a writ of certiorari should be denied.

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* We noted in our memorandum in opposition to the petition for a writ of certiorari in *University of Southern California* that there were only two other cases pending in the district courts at that time. One of those two cases is the present action. The other case, *Oakland Raiders* v. *Office of Emergency Preparedness*, petition for certiorari filed, No. 74-85, August 7, 1974, is now before this Court. Since that time one additional case was filed, *United States* v. *Cleveland Browns, Inc.*, Civ. No. 73-839 (N.D. Ohio), appeal docketed, No. 6-7, T.E.C.A., July 25, 1974, and is currently pending in the court of appeals.